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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 153

PEARL E. DILLEY,
Administratrix of the Estate of Glen D. Dilley, Deceased,
Petitioner,

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit.

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In the Supreme Court of the United States

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Petitioner,

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on January 30, 1964.

OPINIONS BELOW.

The opinion of the District Court for the Southern District of Ohio is unreported and is printed at page 8a of the Record.

The opinion of the Court of Appeals is reported at 327 F. 2d 249 and is printed in the Appendix hereto, *infra*, p. 23.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 30, 1964. (page 32, *infra.*) Rehearing was denied on March 10, 1964. (page 33, *infra.*) The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. In a Federal Employers' Liability Act case may a Court of Appeals reverse and remand for retrial a jury verdict for plaintiff and judgment entered thereon solely because the trial court received in evidence on cross examination of a witness a document impeaching the witness who, on such cross examination, had admitted making the contradicting statement, wherefore the jury had already been apprised thereof?

2. In a Federal Employers' Liability Act case may a Court of Appeals reverse and remand for a retrial a jury verdict for plaintiff and judgment entered thereon solely because the trial court received in evidence on cross examination of a witness a document impeaching the witness who, on such cross examination, had admitted making the contradicting statement, wherefore the jury already had been apprised thereof, where the document also impliedly impeached the witness on a material matter other than the statement which the witness had admitted he made?

3. In a Federal Employers' Liability Act case may a Court of Appeals reverse and remand for retrial a jury verdict for plaintiff and judgment entered thereon because the trial court received in evidence on cross-examination of respondent's foreman called by it as a witness, a form on which in conformity with respondent's rule and practice, he wrote answers based upon physical circumstances within his personal knowledge and concerning which he testified?

4. In a Federal Employers' Liability Act case where plaintiff petitioner's decedent met with injuries and death when an embankment over which he was driving a jeep gave way by reason of carrier negligence in relation there-

to and the carrier argues that decedent's conduct in undertaking to drive the jeep after he appreciated or should have appreciated the danger involved in so doing, made his conduct the sole cause of his injuries and death and its conduct non-negligence, may plaintiff petitioner's counsel argue that in such circumstances, decedent's conduct amounted to assumption of the risk and was not a defense if his injuries and death resulted in part from the negligence of the carrier and may the trial court include in his charge Section 4 of the Act which provides in pertinent part:

> "* * * such employee shall not be held to have assumed the risks of his employment in any case where such injury * * * resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier"?

STATUTES INVOLVED.

45 U. S. C. A. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then

of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

45 U. S. C. A. § 53. Contributory negligence; diminution of damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: PROVIDED, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

45 U. S. C. A. § 54. Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; August 11, 1939, c. 685, § 1, 53 Stat. 1404.

STATEMENT OF THE CASE.

On July 28, 1954, Glen D. Dilley, a signal maintainer employed by respondent, was assigned to install a pipe connection for a derail at Hyatts, Ohio. A derail is a device mounted on one rail to protect against a car on a side track rolling out of the side track and fouling another track. A pipe connection to the switch replaces a manual control and causes the derail to move on or off the rail in response to the setting of the switch itself.

The side track at Hyatts ran nearly due north from the derail a distance of some 184 feet to the switch, where it met the main line. Beginning just north of the derail, the manual control for which rested on a tie which extends beyond the normal ties, a narrow and steep embankment paralleled the track on the east side.

Assisting Dilley were Willis Hatcher and Charles Lushbaugh. Dilley was in charge of the other two men. A portable generator was needed to install the pipe connec-

tion. The generator was carried to Hyatts lashed to the back of a company jeep.

The men had lunch at Powell, Ohio. It was there that they were directed to go to Hyatts.

There were several ways by which the generator could have been brought to the switch where the work was to begin. One such way was to carry the generator by car over the track itself. There were such cars at Powell (16a, 17a*). The distance from Powell to Hyatts was four miles by use of a track and five miles by use of public thoroughfare and private right of way (34a). At Powell, one Gwinn, Dilley's foreman, directed that instead of using the track and transporting the generator by rail, this specially equipped jeep be driven from Powell to Hyatts (34a).

Dilley told Lushbaugh, the regular driver, to take the jeep to the switch, over the embankment. Three or four weeks earlier Lushbaugh, driving this same jeep over that embankment found that the bank "was soft and wheels on the embankment side gave way." (32a). This time Lushbaugh refused to drive the jeep over the embankment. Thereupon Dilley got in the jeep, drove around the derail tie and was four to ten feet north of the derail tie when the bank gave way and the jeep rolled down the embankment. Dilley died a month later from the injuries he received in the accident.

Dilley's foreman, Gwinn, was called as a witness by defendant. Gwinn, who himself, on other occasions, had driven a jeep over this embankment, reached the scene

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*Page references with the suffixes "a" and "b" refer respectively to the Appellant's and Appellee's appendices below, of which nine extra copies are filed herewith. References designated "Tr." refer to the original typewritten transcript of testimony which has also been certified as a part of the record before this Court.

of the occurrence very shortly after it happened. He inspected the terrain and the jeep. The defendant's position, as the Court of Appeals stated it, is that the accident "was caused by the plaintiff's decedent undertaking to operate the jeep and negligently driving it too near the edge or even over the edge of the embankment so as to cause it to overturn." (327 F. 2d 249, 250.)

Gwinn's testimony on direct examination tended to support respondent's contention. Relying upon Gwinn's testimony, counsel for defendant argued on its motion for a directed verdict, "it was the driving of the vehicle and nothing else in the direction directly north, right off the embankment" (Tr. 205). "* * * Now we have the man (Gwinn) who sees the tracks * * * go directly off the embankment" which allegedly caused the accident.

On direct examination, also, Gwinn had testified that Dilley had no authority to drive the jeep and that in so driving it, Dilley was violating a company rule. (35a, 36a). Plaintiff denied the existence of any such rule. No evidence of any written rule in this respect was presented.

On cross-examination, Gwinn conceded that in reporting the accident immediately after he had been to the scene of the occurrence on a Form CJ-68, as required by company practice and rule, he, himself, had written on the form, after the printed language "Describe in full how accident occurred" the words "Jeep upset from right of way when cinders and bank give way." Nary a word in this report made out by Gwinn implied or suggested either that Dilley had driven the jeep "too near the edge or even over the edge of the embankment so as to cause it to overturn" or that Dilley had driven the jeep without authority and in violation of company rule. This Form CJ-68, as written by Gwinn, was then offered on cross-examination and received by the trial court as plaintiff's Exhibit 5.

The jury returned a general verdict for plaintiff. The trial court entered judgment on the verdict.

Respondent's position in the Court of Appeals was that, once Gwinn admitted on cross-examination that he had made the contradicting statement contained in Exhibit 5, the Exhibit itself could not be introduced as an impeaching document.

Adopting this view, the Court of Appeals held:

> "As contended by the defendant, this exhibit containing the witness' opinion as to how the accident happened could not be properly introduced for the purpose of contradicting or impeaching the testimony of the witness because the witness testified that he made the statement contained in it. Where a witness admits a statement attributed to him, there is no necessity to prove it and the statement is not admissible in evidence. 58 Am. Jr. Witnesses Section 780; 98 C. J. S. Witnesses, Section 610." (327 F. 2d 249, 251.)

The jury verdict was set aside and the case remanded for a new trial because the "admission into evidence of this report * * * which convincingly supports plaintiff's version of the cause of the accident was prejudicial to defendant's substantial rights * * *". (327 F. 2d 249, 251).

This, despite the fact that the jury, by Gwinn's oral admission, on cross examination was already apprised of the existence of the report and of the contradicting statement contained therein.

Respondent introduced in evidence at the trial a statement signed by Dilley, taken in the hospital sixteen days after the accident by an experienced railroad investigator. The statement, in part, reads "the accident was simply the result of my taking a chance on driving it up there * * *. The flat top of the fill was too narrow and too soft." (Exhibit A.)

Although the judgment was reversed and remanded for the reason alone that the impeaching document was received in evidence, the Court of Appeals took occasion to direct what a trial court, upon rehearing of this cause, should that ultimately come to pass, should do with respect to the question of reference to the doctrine of assumption of risk.

In the trial court it was the respondent's position that after both Lushbaugh and Hatcher told Dilley that it was dangerous to move the jeep over the embankment and Lushbaugh had refused to drive it, any negligence of the respondent in relation to the unsafe nature of the embankment for jeep travel, became inconsequential. In such circumstances, argued the respondent in effect, its conduct became non-negligence and Dilley's conduct alone caused his injuries and death.

Arguing for a directed verdict on this score, counsel for respondent likened its position to the following claimed analogy:

> "The bicycle on the sidewalk, that's negligence. If my child leaves anything on the sidewalk, if I go out and beg somebody walking down the street to give me ten seconds to move it, and then he walks over it, hearing me and seeing it, I don't think causatively we are so remove (sic) that is the sole and willful act of the fully-warned, completely knowing person who proceeds to do something." (Tr. 132.)

> "If it was unsafe, the only thing I can reiterate is that Mr. Dilley—now as I see it—by his own admission, confirmed by the statement of Mr. Hatcher as to what Mr. Lushbaugh told him, has stated that he was fully aware of what he was doing. No, I don't think this is assumption of risk. I think assumption of risk pertains to the normal instances normal to his occupation. If there was, as Mr. Gaines says, this

unusual hazard, he was fully and completely warned, and the defendant did everything possible, it seems to me, to stop him; prevent him from going forward." (Tr. 204-05.)

In these circumstances, it seemed to petitioner necessary and proper to point out that if Dilley's injuries and death resulted in whole or in part from the negligence of respondent, the fact that he appreciated the danger or should have appreciated the danger did not deprive plaintiff of a right to recover because that would be a situation specifically covered by the law which provided that the employee was not to be held to have assumed the risks of his employment in any case where injury resulted in whole or in part from employer negligence.

The trial court read Section 4 of the Act to the jury in the course of the court's charge.

The Court of Appeals, in its opinion, observed that "a correct instruction on contributory negligence permitting the jury to consider the action of plaintiff's decedent in the light of a dangerous condition known to him is proper and it is not necessary for the court to instruct on assumption of risk * * * where the jury as in this case has been presented with no evidence and has heard nothing from any witness or pleading with respect to the doctrine of assumption of risk until the doctrine was defined and its application to the facts of the case debated in final arguments of counsel and thereafter merely mentioned in court instructions it is believed that it would have been the better practice to have eliminated any reference to the doctrine." (327 F. 2d 249, 253.)

REASONS FOR ALLOWING THE WRIT.

The Court of Appeals here has rendered a decision on a federal question in conflict with applicable decisions of this Court.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The opinion of the Court of Appeals is in conflict with the decision of other courts of appeals on the same matter and unless corrected the effect of such opinion will be to cause error upon retrial of this Federal Employers' Liability Act case.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

This Court frequently has emphasized that a jury's verdict in an action under the Federal Employers' Liability Act is not lightly to be vitiated.

The Court of Appeals in the case at bar has held it prejudicially erroneous for the trial court to receive in evidence on cross-examination a document containing a contradicting statement after the witness had admitted making such statement in the document.

This decision by the Court of Appeals plainly is contrary to *Gordon, et al. v. United States,* 344 U. S. 414, where this Court stated:

> "We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence * * *." (344 U. S. 414, 420.)

This question is dealt with at length in 3 *Wigmore on Evidence,* 3d. Ed. § 1037. There it is stated:

"Even where the witness admits having made the other statements this does not prevent the opponent from offering it in evidence by his own witnesses; for he may prefer to have it clearly brought out and emphasized and it would be unfair to restrict him to the unemphatic mode of proving it by the witness' admission and to subject him to the necessity of disputing whether the admission has been full and exact."

Gordon, supra, cites *Wigmore* as authority.

In New York, *Wachs v. Commercial Travelers Mutual Accident Association of America,* 283 App. Div. 29, 125 N. Y. S. 857, held that the fact that the witness had admitted making a prior inconsistent statement did not justify the exclusion of the inconsistent statement from the evidence and it was reversible error so to exclude the statement. To the same effect see *Ashby v. Steinitz, et al.,* 18 App. Div. 2d 963, 238 N. Y. S. 2d 395 (1963); *Gemini v. Zanderer,* 185 N. Y. S. 2d 390 (1959); and *Nappi v. Falcon Truck Renting Corp.,* 286 App. Div. 123, 141 N. Y. S. 2d 424 (1955); aff. without opinion 1 N. Y. 2d 750, 152 N. Y. S. 2d 297.

In *U. S. v. Browne,* 313 F. 2d 199 (2d Cir., 1963), the Court held: "Nor was the prosecutor required to forego offering testimonial proof of the making of prior inconsistent statements because of the concession by defense counsel" [that the witness had made such statements]. A similar holding in that Circuit was made in *Zimberg v. U. S.,* 142 F. 2d 132 (2d Cir., 1944), cert. den. 323 U. S. 712.

Illinois also follows the *Wigmore* view. In *People v. Williams,* 22 Ill. 2d 498, 177 N. E. 2d 100 (1961), where the witness admitted signing prior contradictory statements, it was held not error to receive the statements in evidence, even though the witness admitted saying the

things contained in such statements, citing *Wigmore* § 1037.

The Court of Appeals relied upon "58 Am. Jur. Witnesses Section 780: (and) 98 C. J. S. Witnesses Section 610" in support of its decision.

Neither *Am. Jur.* nor *C. J. S.* refer to the most respectable authorities holding directly contrary to the statements made in such publications on this question.

Scrutiny of the several cases upon which *Am. Jur.* and *C. J. S.* do rely reveals that in not a single case did an upper court reverse a trial court for admission into evidence of a written document in which appeared the impeaching statement after the witness admitted writing the impeaching language. And while *C. J. S.* does make the statement upon which the Court of Appeals relied, the same paragraph also recites that:

> "* * * there are decisions to the effect that, whether or not such evidence is competent, its admission was not such as to require a reversal, under the circumstances of the case."

The document in question, Exhibit 5, also clearly was admissible because it impeached impliedly a major contention of the respondent that Dilley violated a company rule by operating the jeep. Gwinn testified to this effect.

Exhibit 5 afforded Gwinn the opportunity and presented him with the duty to state unequivocally that Dilley lacked authority to drive the jeep. He knew that Dilley was driving it when the jeep upset (40a) before he wrote out his report. If Dilley were not authorized to drive it, Gwinn should have indicated that in filling out the form, Exhibit 5.

Exhibit 5, therefore, impliedly contradicted Gwinn in this respect.

The Court of Appeals, we respectfully submit, was without warrant to accept as fact Gwinn's claim that Dilley had no right to drive the jeep.

Petitioner's position controverting Gwinn's claim on this score is supported not only by the implied contradiction in Exhibit 5 but also by the fact that in Dilley's statement, Exhibit A, taken and introduced into evidence by defendant, there is no reference to any lack of right in Dilley to drive.

In any event, Exhibit 5 did tend to contradict Gwinn and was independently admissible for that reason.

In the instant case the respondent did not complain in the Court of Appeals of the fact that, on cross-examination, Gwinn admitted that in the report, Exhibit 5, he had written in answer to the question "Describe in full how accident occurred" the words "Jeep upset from right of way when cinders and bank give way." How then was respondent prejudiced by admission of the document in which he admitted writing the contradicting statement? The jury was already apprised thereof.

The trial court, on motion for judgment notwithstanding the verdict, referred to *Dotson v. Penn. R. R. Co.*, 142 F. Supp. 509 (W. D. Pa., 1956), where a form, quite comparable in nature to Exhibit 5, was held admissible as substantive evidence. Respondent, in the Court of Appeals, conceded that *Dotson* was in point but argued that it was erroneous. However this may be, while we believe that Exhibit 5 was admissible also as substantive evidence, it was offered on cross-examination and the fact that it was or was not admissible as substantive evidence, did not militate against its admissibility as an impeaching document.

According to Gwinn himself, Exhibit 5 actually did reflect the physical circumstances within his personal knowledge.

In answer to the question on cross-examination "Where was it that the bank gave way, as you saw it, can you point out * * * on Mutual Exhibit No. 2 * * * where it was that the bank gave way?" Gwinn testified:

> "A. You refer—there is an 'X' right there; there is about 6 to 8 inches of that cinders and dirt gave way, and that, then the jeep overturned.
>
> Q. That's what you meant when you said that you had evidence of it; or the bank gave way?
>
> A. Yes, sir, that's our reference.
>
> Q. And you are referring to the point where an 'X' appears on Mutual Exhibit 2?
>
> A. That's right.
>
> The Court: That is what you referred to in your report?
>
> A. Yes, sir." (4b.)

and in re-direct examination of Gwinn counsel for defendant asked the following question to which the answer noted was given.

> "By Mr. Smith:
>
> Q. Mr. Gwinn, you referred to this point with the "X" of Mutual Exhibit No. 2, where you—as I recall it—you said 6 or 8 inches of the embankment had given way; did the tracks of the jeep, which you previously referred to, come up to that point where you noticed the 6 or 8 inches giving way?
>
> A. Yes, sir." (R. 193.)

Exhibit 5 thus was admissible as substantive evidence in these circumstances on the authority of both *Dotson, supra,* and *Chicago, St. Paul, etc. v. Kulp,* 102 F. 2d 352.

The Court of Appeals in the case at bar seeks to make a distinction between the report of a conductor in charge of a train and a foreman in charge of a work crew. We submit, most respectfully, the distinction escapes us. Each would be in charge of personnel. Each would be

charged with the same duty to fill out a report such as the one with which we here deal.

There can be no material difference between the two.

This Court in *Lavender v. Kurn,* 327 U. S. 645, 654; 66 S. Ct. 740, 744, stated:

> "Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act. But inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony we need not determine whether that discretion was abused in this instance."

In the circumstances here present, there can be no force in any contention that the trial court abused its discretion in receiving Exhibit 5.

Certainly the rationale of *Gordon, supra,* the eminently authoritative statements of Professor Wigmore and the pronouncements of the highest courts in New York and Illinois not only warrant but affirmatively call for a trial court to receive such a document even though the witness thus impeached admits that he made the contradicting statement contained in it.

Rule 43 of the Federal Rules of Civil Procedure directs that where there be a conflict, "the rule which favors the reception of evidence governs * * *."

In the trial court, the respondent's position was that whatever negligence on its part existed in relation to the use of the embankment as a passage for jeep travel, Dilley's conduct was the sole cause of his injuries and death.

Respondent points to the effort made by the men who accompanied Dilley to dissuade him from driving the jeep over the embankment, to the refusal of one of them, Lushbaugh, to drive the jeep over that area, occasioned by his own experience shortly theretofore and Dilley's statement that he took a chance in driving the jeep across that

embankment which was "too soft and too narrow." Ergo, argues respondent, Dilley did appreciate or should have appreciated the danger and when, despite such appreciation of danger, he nevertheless, undertook to drive the jeep,—his, Dilley's conduct in so doing, became the sole cause of his injuries and death. To respondent, then, its negligence in relation to the embankment became non-negligence.

To petitioner, in such a context, it would, to borrow a phrase from the opinion of this Court in *Union Pacific R. R. v. Hadley*, 246 U. S. 330, "be emptying the statute of its meaning" to say that Dilley's injuries and death in such circumstances did not "result in part from the negligence" of respondent. The argument that Dilley appreciated the danger or should have appreciated the danger occasioned by respondent's negligence is precisely the kind of argument which customarily was urged before 1939 to justify a non-suit or direction of a verdict for the carrier on the ground that the employee had assumed the risk. It was precisely also this kind of situation which prompted the Congress to enact Section 4 of the Act which denies to the carrier the previously existent defense of assumption of risk in any case where the injury resulted in whole or in part from the negligence of the carrier.

In such a context to counter the respondent's argument that Dilley's conduct transformed the respondent's negligence into non-negligence, petitioner felt compelled to argue that such conduct by Dilley would amount to assumption of the risk and would still make the respondent answerable in damages if Dilley's injuries resulted in whole or in part from its negligence.

The trial court read Section 4 of the Act to the jury.

The opinion of the Court of Appeals clearly directs a trial court on retrial of this case to eliminate any refer-

ence to Section 4 of the Act where "the jury as in this case has been presented with no evidence and has heard nothing from any witness or pleading with respect to the doctrine of assumption of risk." Certainly it cannot be said that no witness testified to circumstances which constituted the traditional concept of assumption of the risk where negligence of the carrier contributed to the danger which allegedly should have been appreciated. Lushbaugh wouldn't take the jeep over the embankment because when he had driven the jeep a short time before the bank was "soft" and the wheels "on the embankment side gave way." Dilley himself in his statement refers to "taking a chance" because the "flat top of the fill was too narrow and too soft." Such testimony is the stuff of which classic assumption of the risk as commonly understood before 1939 was compounded where the negligence of the carrier contributed to the danger.

That counsel for respondent does not now call it assumption of the risk is quite understandable. It is exactly this which this Court had in mind, we submit, when in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, it was stated that

> "* * * every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' "

The opinion in the case at bar quotes the language "that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment," and certain language by Mr. Justice Frankfurter in support of its position that *Tiller* held the words "assumption of the risk" to have become "verboten" and that a plain-

tiff may not deal with the doctrine of "assumption of risk" in terms of the 1939 amendment where defendant does not call it "assumption of risk."

This we submit is a mistaken concept. What *Tiller*, as we read it, held, was that the doctrine of assumption of risk which immunized a negligent carrier against paying damages to its injured employee where the latter appreciated the risks occasioned by the carrier's negligence was completely obliterated and that Congress "by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to non-negligence." This is a far cry from saying no one may use the words "assumption of risk."

Where the negligent carrier asserts vigorously as a complete defense to an employee's action, what before 1939 was commonly known, described and understood as assumption of the risk, although the defendant does not now call it such, it would indeed be to "empty the amendment of its meaning" to deny to the injured employee the right to describe that asserted defense for what it is—assumption of the risk—and to point out that such an alleged defense by whatever name it be called, is barred by the law which itself specifically calls it what it is.

It is the doctrine, as commonly understood and applied before 1939, concerning which *Tiller* states "every vestige" was obliterated by the amendment.

To manacle the injured employee's right to invoke the amendment by denying him the right to refer to it, permits a use of the amendment inimical to the interests of the injured employee, and frustrates and thwarts the purpose of the amendment.

In *Koshorek v. Pennsylvania Railroad Company*, 318 F. 2d 364 (3rd Cir., 1963), the Court of Appeals there

recognized that aspects of the employee's conduct which would have been categorized, prior to amendment of the Act, as assumption of risk are to be distinguished from the scope of comparative negligence. Cited with approbation in *Koshorek* is *Atlantic Coast Line R. Co. v. Burkett*, 192 F. 2d 941 (5th Cir., 1951) where it was held that the inclusion of a reference to assumption of risk in the charge to the jury was proper. Said the Court in *Burkett:*

> "[W]e think that the trial judge was justified in thinking that in the absence of a charge on assumption of risk, the jury might have considered that defense under the guise of nonnegligence. * * *
>
> As said in the Tiller case, supra; unless great care be taken the servant's rights will be sacrificed by simply charging him with assumption of risk under another name." 192 F. 2d at p. 943.

Most courts have considered this matter to be discretionary in the trial court.

In the following cases it was held not error to instruct on assumption of risk:

Atlantic Coast Line R. Co. v. Burkett, 192 F. 2d 941 (5th Cir., 1951); *Klimaczewski v. Pacific-Atlantic S.S. Co.*, 246 F. 2d 875 (3rd Cir., 1957); *Kelley v. Great Northern Ry. Co.*, 371 P. 2d 528 (1962); *Kiger v. Terminal R. Assn. of St. Louis*, 311 S. W. 2d 5 (1958).

In the following cases it was held not error to refuse to instruct on assumption of risk:

Hill v. Northern Pacific R. Co., 297 N. W. 2d 627 (1941); *Texas Pacific R. Co. v. Buckles*, 232 F. 2d 257 (5th Cir., 1956); *Seaboldt v. Penn. R. Co.*, 290 F. 2d 296 (3rd Cir., 1961); *DePascale v. Penn. R. Co.*, 180 F. 2d 825 (3rd Cir., 1950); *Gowins v. Penn. R. Co.*, 299 F. 2d 431 (6th Cir., 1962).

Koshorek, supra, held it prejudicial error to refuse to instruct on assumption of risk under the circumstances of that case.

In the case at bar the Court of Appeals does not assert that there was an abuse of discretion on the part of the trial court but it does direct that on retrial the discretion be exercised otherwise than on the trial reviewed by that court.

This holding by the Court of Appeals sets the law of the Sixth Circuit at variance with that of the Third and Fifth Circuits and with the Supreme Courts of Washington and Missouri on a point that is of vital importance to railroad employees.

Before 1939 and after 1939, save as to Safety Appliance Act cases, negligence was an integral part of the Federal Employers' Liability Act. This was not changed by the 1939 amendments.

Before 1939 the doctrine of comparative negligence was an integral part of the Federal Employers' Liability Act. 45 U. S. C. 53. When applicable this provision diminished the amount of the verdict in proportion to the amount of negligence in the case attributable to the employee. This section was not changed by the 1939 Amendments.

Before 1939, the doctrine of assumption of risk was invoked time and time again in Federal Employers' Liability Act cases where the plaintiff appreciated or should have appreciated dangers created in whole or in part by carrier negligence. When regarded as applicable, however, assumption of the risk in such circumstances was a complete defense and time and time again plaintiffs were non-suited where carrier negligence contributed to create the danger, the risks of which the employee was held to have assumed.

This situation was changed by the 1939 amendment. By adding Section 4 of the Act, 45 U. S. C. A. 54, the Congress plainly, clearly and unambiguously erased as a defense the assumption of the risks of injuries, where such injuries resulted in whole or in part from carrier negligence.

If counsel for the employee be not permitted to describe in the circumstances here attendant, the alleged defense of non-negligence for what it is—viz., assumption of the risk in the classic form in which it was urged so vigorously before 1939—then a substantial part of the benefits to employees which the Congress thought it was grafting onto the Federal Employers' Liability Act, in that year, has dissolved into mere nothingness.

This case was filed just short of nine years ago. It has been twice tried. Dilley's widow has been waiting a long, long time to have her rights determined. The opinion of the Court of Appeals in the case at bar on the matter of the doctrine of assumption of risk in the context of the position of the respondent augurs for a much further delay if this case has to be tried again without definitive guidance from this Court on this question.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE COURT OF APPEALS.

No. 15186.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

PEARL E. DILLEY,
Administratrix of the Estate of Glen D. Dilley, Deceased,
Plaintiff-Appellee,

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.

Decided January 30, 1964.

Before: MILLER and WEICK, Circuit Judges, BROOKS, District Judge.

BROOKS, District Judge. This is an appeal from a jury award to Pearl E. Dilley, Administratrix of the Estate of Glen D. Dilley, deceased, plaintiff-appellee in an action brought under the Federal Employers' Liability Act, 45 U. S. C., Section 51, et seq., against the Chesapeake & Ohio Railway Company, defendant-appellant. The parties hereafter will be designated as in the trial court.

The plaintiff's decedent, Glen Dilley, was employed by the defendant as a signalman and was operating a jeep on a narrow right-of-way on top of a 15-foot embankment

parallel to some railroad tracks when the jeep went over the embankment and overturned, resulting in his death. On the day of the accident Dilley and two other employees of the railroad, Lushbaugh and Hatcher, were assigned by Gwinn, the foreman in charge of a 12-man work detail, to install a pipe-connected derail near Hyatts, Ohio. A derail is a device mounted on one rail to protect against a car on a side track rolling out of the side track and fouling another track. A pipe connection to the switch replaces a manual control and causes the derail to move on or off the rail in response to the setting of the switch itself. The derail pipe to be installed was to run a distance of some 184 feet from a switch to a derail tie. The derail tie extended on to the embankment right-of-way and was horizontal to the ties upon which the railroad tracks rested. Due to the extension of the derail tie out over the right-of-way, only a narrow passageway remained between the end of the derail tie and the edge of the embankment.

A portable generator that was needed to install the derail was mounted on a jeep which was located some four miles from the job site. Because of seniority Dilley was in charge of the three-man crew but he did not have an automobile operator's license and was not qualified or authorized to operate a jeep, so when the foreman designated the men to do the work he directed Lushbaugh, who was a licensed driver, to go get the jeep and charged him with its operation. Lushbaugh got the jeep and drove it to the job site where he met the other two men. He drove it up the embankment but when he reached the derail tie he stopped and refused to proceed further although the generator was needed for work at the switch. Lushbaugh had previously operated a jeep from the derail to the switch and on one occasion the jeep had gone over the side of the embankment. When he stopped the jeep on this occasion

he gave as his reason that it was too dangerous to proceed further, and Hatcher also commented that it was too dangerous to continue. However, plaintiff's decedent, in spite of these warnings, ordered Lushbaugh out of the jeep, stating in effect that Lushbaugh should get out and let someone in that could drive it. He moved the jeep only a short distance along the narrow right-of-way around the derail tie and toward the switch when the fatal accident occurred.

Probably the most crucial factual question presented by the evidence in this case was whether, as plaintiff contends, the fatal accident occurred because the embankment was defective and suddenly gave way or whether, as defendant contends, it was caused by the plaintiff's decedent undertaking to operate the jeep and negligently driving it too near the edge or even over the edge of the embankment so as to cause it to overturn. The importance of this issue is reflected by the pleadings of the plaintiff, where five specific acts of negligence are attributed to the defendant, four of which were submitted to the jury with all but one drawn to support plaintiff's theory that the embankment was defective. The four specifications of negligence submitted in the instructions to the jury were the failure to (1) provide plaintiff's decedent with a reasonably safe place in which to work; (2) to provide proper and adequate equipment for the transportation of defendant's machinery; (3) to construct the embankment so as to provide adequate space and support for the work being performed thereon; and (4) in permitting its embankment to become defective, weak, and insecure so as to constitute a hazard likely to result in injury. The importance of this issue to the defendant is also apparent as a favorable jury verdict could hardly be returned for the defendant unless the defendant's version of how the accident occurred prevailed.

Evidence directly relating to this critical factual issue was permitted to be introduced over defendant's objection and is one of the grounds urged for reversal of this case. The evidence objected to is a written report of the accident made by the foreman, Gwinn, on a regular printed form used by the railroad for the required reporting of accidents by its employees. Gwinn's answer to the form question, "Describe in full how accident occurred," was "Jeep upset from right-of-way when cinders and bank gave way." Gwinn was not an eyewitness of the accident but he did view the scene before making out his report. Defendant insists that the admission into evidence of this report containing Gwinn's opinion as to how this accident occurred and which convincingly supports plaintiff's version of the cause of the accident was prejudicial to defendant's substantial rights. We agree.

As contended by the defendant, this exhibit containing the witness's opinion as to how the accident happened could not be properly introduced for the purpose of contradicting or impeaching the testimony of the witness because the witness testified that he made the statement contained in it. Where a witness admits a statement attributed to him there is no necessity to prove it and the statement is not admissible in evidence, 58 *Am. Jur.*, Witnesses Section 780; 98 *C. J. S.* Witnesses Section 610. Neither was the report admissible in evidence under the exception to the hearsay rule provided by the Federal Business Records Act, 28 U. S. C. 1372. The Supreme Court, in *Palmer v. Hoffman*, 318 U. S. 109 (1943), settled this issue conclusively when it affirmed the refusal of the trial court to admit a signed statement of a railroad engineer concerning his version of a grade crossing accident in which the locomotive he was operating was involved and which he gave when he was interviewed by an official of

the company and a representative of a state commission as not being made in the "regular course of business" contemplated by the Act. In holding the engineer's report inadmissible the Court stated, "It is not a record made for the systematic conduct of a business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' version of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act. * * * Their [the reports] primary utility is in litigating, not in railroading."

Finally, the report was not properly admissible into evidence as an extrajudicial admission of the defendant. The mere fact that a railroad requires an employee to make a report to it of an accident is not sufficient to cause the report to become binding upon the railroad as its own statement. Whether a report of an employee becomes an admission of the employer depends upon the scope of the employee's authority. *Nuttall v. Reading Co.*, 235 F. 2d 546 (3rd Cir. 1956); *Flintkote Co. v. Lysfjord*, 246 F. 2d 368 (9th Cir. 1957); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 349 (D. C. Mass. 1950); *Lever Bros. Co. v. Atlas Assur. Co.*, 131 F. 2d 770 (7th Cir. 1942); *Lorber v. Vista Irr. Dist.*, 127 F. 2d 628 (9th Cir. 1942); *Wigmore on Evidence* (3rd Ed.), Section 1078; *Restatement, Agency*, Section 287; 2 *Morgan, Basic Problems of Evidence* 236. A careful and thorough analysis of

this question appears in *United States v. United Shoe Machinery Corp., supra.* There Judge Wyzanski said,

> "Where the party is a natural person, any statement made by him either publicly or secretly is his. See Chadwick v. United States, 6 Cir., 141 F. 225, 239; Wigmore, Evidence, 3d Ed., Sec. 1057(3).
>
> "Where the natural person has an agent who makes a statement *to a third person,* the statement is the principal's if the agent was authorized to make the statement or was authorized to make on the principal's behalf true statements concerning the subject matter. Restatement, Agency Sec. 286. This is because of the doctrine of *respondeat superior.*
>
> "Where the agent makes a report *to the principal or to another agent,* and all that appears is that the principal had authorized the agent to make such a report, a statement in the report is not the principal's and is not an extrajudicial admission of the principal. Restatement, Agency Sec. 287; Morgan, supra; Mechem, Agency, 2d Ed., Sec. 1784; Langhorn v. Allnutt, 4 Taunt. 511, 517, 128 Eng. Rep. 429, 431. The principal gave his agent limited authority to investigate a topic and report. Authority merely to report *to* a principal or a fellow agent is not authority to commit the principal. Otherwise every time a principal asked an agent to look into the history of an accident, or an invention or the state of competition, the principal would be held to be an underwriter of the report and to guarantee its trustworthiness. But the principal did not intend to vouch for it sight unseen. The principal was not ready to make the statement his own or to give it to the world. And the doctrine of *respondeat superior* does not apply. * * *
>
> "A corporation may make its statements by a vote of the shareholders (citing case) or on most matters by a vote of the directors. And whether these be open or secret votes, they are admissions of the corporation. The difficulty arises with respect to officers and em-

ployees. Where these agents speak to the outside world, the corporate principal like the individual principal is, by the fiction of *respondeat superior*, held accountable for the agent's statement if he was authorized to make the statement or was authorized to make on the principal's behalf true statements concerning the subject matter (citing cases). However, where these agents report to other corporate agents, the mere fact that the corporation gave the agents authority to make such intramural reports does not make statements in those reports the statements of the corporation (citing cases). Otherwise every time the directors required a subordinate to make a report of an accident, an invention or the state of competition the subordinate would have authority not only to reply but also to commit the corporation."

Chicago, St. P., M. & O. Ry. v. Kulp, 102 F. 2d 352 (8th Cir. 1939), 133 ALR 1445, and *Dotson v. Penn. R. R.*, 142 F. Supp. 509 (W. D. Penn. 1956), relied on by plaintiff, do hold that reports by the conductor in charge of a train as to the cause of accidents are admissible where the conductor is required by the railroad to report the cause of the accident on the ground that such declarations are within the scope of his duty and therefore are declarations of the principal. *Dotson*, however, while citing *Kulp*, does also advance additional grounds of admissibility stating the "rule is well settled which permits the receipt of admissions made by an agent of a party when the agent's powers are broad enough to constitute him the general representative of the principal with broad managerial responsibilities" and holding the conductor's responsibilities and powers placed him in this category. However, the accident report in the present case was not made by a conductor in charge of a train but by a foreman of a 12-man work crew. *United States v. New York Trade Zone Operators*, 304 F. 2d 792 (2nd Cir. 1962), also relied upon by

the plaintiff, is distinguishable as the accident report there was admissible under the Federal Business Records Act, 28 U. S. C. 1732.

It is for these reasons that it is concluded the intra-company report of the accident made by the foreman of a work gang even though he was required by his employer to make it was not an admission of the railroad and was not admissible under any suggested rule of evidence.

Since a new trial must be granted we think it appropriate to comment briefly on the charge given the jury on assumption of risk. After all the evidence was in the defendant, anticipating the plaintiff would argue that the defense offered by the defendant was the defense of assumption of risk and that such a defense was not available under the statute, objected to the doctrine of assumption of risk being referred to either in instructions or in plaintiff's argument. The objections were overruled and the plaintiff in her argument* defined assumption of risk and, as anticipated, stated to the jury that the defense offered was nothing but the defense of assumption of risk and by specific legislative enactment (53 Statutes 1404; 45 U. S. C. Section 54) such a defense was not available to the defendant. The defendant in argument responded that assumption of risk was not in the case and was not its defense. The court in instructing the jury charged on assumption of risk by quoting the pertinent portion of Section 4 of the Act without further explanation of the doctrine. The defendant urges that the effect of the plaintiff's argument and the charge was to inform the jury that assumption of risk was in the case, since the plaintiff so argued and the court charged on it, and that it was no

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* The arguments do not appear in the transcript but reference to context in briefs is not contradicted.

defense; also that the jury was unjustifiably forced to engage in the puzzling venture of distinguishing between assumption of risk and contributory negligence. The defendant pleaded contributory negligence in this case and did not plead assumption of risk. A correct instruction on contributory negligence permitting the jury to consider the actions of plaintiff's decedent in the light of a dangerous condition known to him is proper and it is not necessary for the court to instruct on assumption of risk. *Gowins v. Penn. R. R.*, 299 F. 2d 431 (6th Cir. 1962). In *Tiller v. Atlantic Coast Line R. R.*, 318 U. S. 54 (1943), it was held "that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment * * *" and in his concurring opinion Justice Frankfurter states, "Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded." In view of these expressions, when it is necessary to distinguish between assumption of risk and contributory negligence the instructions should carefully and fully make the distinction. However, where the jury as in this case has been presented with no evidence and has heard nothing from any witness or pleading with respect to the doctrine of assumption of risk until the doctrine was defined and its application to the facts of the case debated in final arguments of counsel and thereafter merely mentioned in court instructions it is believed that it would have been the better practice to have eliminated any reference to the doctrine. See *Seaboldt v. Pennsylvania R. R.*, 290 F. 2d 296 (3rd Cir. 1961); *DePascale v. Pennsylvania R. R.*, 180 F. 2d 825, 827 (3rd Cir. 1950); *Texas and Pacific Ry. v. Buckles*, 232 F. 2d 257 (5th Cir. 1956), cert. denied, 351 U. S. 984; *Koshorek v. Pennsylvania R. R.*, 318 F. 2d 364 (3rd Cir. 1963).

We find it unnecessary to consider other contentions urged by counsel for the respective parties. The judgment is reversed with directions to grant a new trial.

JUDGMENT OF THE COURT OF APPEALS.

(Filed Jan. 30, 1964.)

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed with directions to grant a new trial.

It is further ordered that defendant-appellant recover from plaintiff-appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Approved for entry:

s/ HENRY L. BROOKS,
United States District Judge.
(Sitting by Designation)

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING.

(Filed March 10, 1964.)

The petition for rehearing of the appellee, Pearl E. Dilley, having been considered by the Court:

IT IS ORDERED that said petition for rehearing be denied.

Approved for entry:

s/ HENRY L. BROOKS,

United States District Judge.